NO. 85382-7

SUPREME COURT OF THE STATE OF WASHINGTON

DOUGLAS FELLOWS as Personal Representative of the Estate of JORDAN GALLINAT,

Petitioner,

v.

DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHISON, M.D., and SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

ANSWER OF RESPONDENT DANIEL MOYNIHAN, M.D., TO PLAINTIFF'S MOTION FOR DISCRETIONARY REVIEW

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondent Moynihan

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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I. IDENTITY OF RESPONDING PARTY

Defendant/Respondent Daniel Moynihan, M.D. files this answer to Petitioner's Motion for Discretionary Review (erroneously designated as a "Petition for Review").

II. SUMMARY OF DR. MOYNIHAN'S ARGUMENT AGAINST GRANTING DISCRETIONARY REVIEW

The Court of Appeals' rulings in this case are not decisions terminating review and, thus, plaintiff's "Petition for Review" is being treated as motion for discretionary review. In his "Petition for Review", plaintiff has not addressed any of the RAP 13.5(b) considerations governing acceptance of discretionary review of an interlocutory decision. Applying the RAP 13.5(b) considerations governing acceptance of review, discretionary review should be denied because neither the Court of Appeals nor the trial court committed obvious error that renders further proceedings useless, committed probable error that substantially alters the *status quo* or petitioner's freedom to act, or so far departed from the accepted and usual course of judicial proceedings. The trial court correctly declined to compel Southwest Washington Medical Center ("SWMC") to produce records that its peer review and quality improvement programs generated concerning Dr. Moynihan because RCW 70.41.200(3) and RCW 4.24.250 both expressly provide that such records are not subject to review, disclosure, discovery or introduction into

evidence in any civil action. And, contrary to petitioner's assertions, neither the trial court's rulings nor the Court of Appeals rulings denying review under RAP 2.3(b) conflict with any of the four Supreme Court decisions that petitioner cites as conflicting decisions.

III. COUNTERSTATEMENT OF THE CASE

A. The Statutory Context for the Discovery Rulings at Issue.

The Legislature enacted RCW 70.41.200 in 1986. Subsection (1) of that statute requires hospitals to have health care quality improvement programs that include, among other things, periodic review of the competence and credentials of all physicians associated with the hospital and a medical staff privileges sanction procedure.[1] Subsection (3) creates an evidentiary privilege for information and documents created for and maintained by hospital quality improvement committees:

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[1] RCW 70.41.200(1) provides in pertinent part that:

> (1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:
> (a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. . . .
>
> (b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;
>
> (c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital; . . .

> ***Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action***, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received. [Emphasis supplied.][2]

RCW 4.24.250, enacted in 1971, allowed, but did not require, any hospital to have a "regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifica-

[2] RCW 70.41.230(5) reiterates that "[i]nformation and documents created specifically for, and collected and maintained by a quality improvement are not subject to discovery or introduction into evidence in any civil action," subject to the same limited exceptions set forth in RCW 70.41.200(3). Petitioner has never claimed that any of the exceptions applies to the SWMC records he seeks in discovery.

tions of members of the profession . . . ," but barred disclosure or civil discovery of the records of such a hospital committee:

> (1) . . . ***The proceedings, reports, and written records of such committees or boards***, or of a member, employee, staff person, or investigator of such a committee or board, ***are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action***, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider. . .[3] [Emphasis added.]

B. The Factual Background for Plaintiff's Malpractice Lawsuit.

In 1996, Dr. Moynihan, a family practice physician, unsuccessfully attempted to deliver Jordan Gallinat at Southwest Washington Medical Center (SWMC). Dr. Jane Ahearn, an OB/GYN, delivered Jordan by emergency C-section. Dr. Kathleen Hutchinson, a pediatrician, participated in Jordan's resuscitation. *See App. 72; Moy. Supp. App. 185, 220.*[4] Based on Jordan's case and a prior obstetrical case, SWMC's Executive Committee initiated corrective action that resulted in Dr. Moynihan losing

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[3] The statute's reference to "actions arising out of the . . . restriction or revocation of" clinical staff privileges is to actions by a provider whose privileges have been restricted or revoked, not to malpractice actions against such a provider. Petitioner has not argued otherwise.

[4] The record citations for this motion can be confusing. Citations to "*App.* ___" are to the 119-page Appendix that plaintiff filed with his initial (RAP 2.3(b)) Motion for Discretionary Review in the Court of Appeals. Citations to "*Moy. Supp. App.* ___" are to the Supplemental Appendix (paginated 120-283) that Dr. Moynihan filed with his Answer to that motion. Citations to *App. II* __" are to the Appendix (paginated 120-216) that plaintiff filed in support of his Motion to modify in the Court of Appeals. Citations to "*Moy. 2d Supp. App.* ___" are to the Appendix (paginated 217-245) that Dr. Moynihan filed with his Answer to plaintiff's motion to modify the Commissioner's Ruling denying review.

his operative vaginal delivery privileges until he completed a mini-residency and was proctored for 30 obstetrical cases. *App. 13 (¶ ¶ 1.2-1.3).* The Department of Health (DOH) filed charges against Dr. Moynihan. *App. 13-16.* In response to the hospital action and DOH charges, Dr. Moynihan did not renew his obstetrical privileges at SWMC, and agreed not to provide in-hospital obstetrical or postpartum care. *App. 60, 62.*

C. Plaintiff's Request for Production of SWMC Records Pertaining to the Defendant Physicians, and Defendants' Assertion of Privilege Under RCW 70.41.200(3) and RCW 4.24.250.

Plaintiff sued Dr. Moynihan, Dr. Hutchinson, and SWMC (but not Dr. Ahearn), alleging that they negligently caused injury to Jordan. During discovery, plaintiff moved to compel SWMC and Dr. Moynihan to produce credentialing, privileging, and personnel files for Drs. Moynihan, Hutchinson, and Ahearn, as well as SWMC's investigation records for the two cases that led to its corrective action against Dr. Moynihan. *App. 71-96.* Plaintiff argued that there was no evidence that such files are subject to the privilege conferred by the "peer review" statute, RCW 4.24.250, or the "quality improvement" statute, RCW 70.41.200(3), and no evidence that SWMC even *had* a quality review committee in 1996 or 1997, when it investigated Dr. Moynihan's patient care. *App. 86-88.*[5]

[5] Plaintiff's motion made no request for *in camera* review of SWMC files.

In opposition, SWMC provided the certification of its counsel, Amy T. Forbis, that SWMC had a regularly constituted quality improvement/peer review committee in 1996-97 and that the requested files are subject to the statutory privileges. *App. 98.* The trial court denied plaintiff's motion to compel on May 4, 2010, "except to the extent that the information or materials [in SWMC's files] fall within the exceptions to the privilege described in RCW 70.41.200(3) and RCW 70.41.230(5),"[6] and ordered SWMC to file, within two weeks, "a certification that all of the credentialing and privileging materials sought are covered by the [statutory] privilege," or by the attorney-client privilege or work product doctrine, and produce any material not so covered. *App. 1-2.* SWMC counsel Forbis duly certified that the files had been reviewed and are privileged. *App. 100-01.*[7] Plaintiff filed a motion for reconsideration, *Moy. Supp. App. 209-13,* which the trial court denied on May 27, *App. 3-4.*

Plaintiff then filed a motion for *in camera* review of the SWMC files, *App. 102-06,* which the trial court denied on June 21, *App. 5-6.* In the June 21 order, the court ordered SWMC's counsel to certify that any

[6] The reference to exemptions is to the lengthy last sentence of RCW 70.41.200(3), quoted above on page 3, which sentence RCW 70.41.230(5) reiterates.

[7] On May 20, 2010, SWMC counsel Forbis filed a certification that the credentialing files for Dr. Moynihan, Dr. Hutchinson, and Dr. Ahearn had been received, reviewed, and analyzed, and that the information and documents they contain are protected by the quality assurance and quality improvement statutes and as work product. *App. 100-01.*

documents exempt from the privilege conferred by RCW 70.41.200(3) and 70.41.230(5) "were produced or do not exist." *App. 6.* Ms. Forbis so certified on July 7. *Moy. Supp. App. 280-81.*[8]

Plaintiff moved for discretionary review of the May 4, May 27, and June 21 orders. Plaintiff then moved in the trial court for a "Rule 37 Evidentiary Hearing" at which he would interrogate an SWMC official to test SWMC's claims of privilege. *See Moy. 2d Supp. App. 219.* Following oral argument on plaintiff's RAP 2.3(b) motion for discretionary review on August 11, and before issuing a ruling, the Court of Appeals Commissioner requested copies of any order arising out of the hearing on plaintiff's motion for an evidentiary hearing. *Moy. 2d Supp. App. 217.*

On August 17, the trial court entered an order denying plaintiff's motion for an evidentiary hearing, and plaintiff's counsel provided a copy of that order to the Court of Appeals Commissioner on August 19. *See App. II 163-64.* On August 18, SWMC had submitted to the Court of

[8] Plaintiff argued in the Court of Appeals, but does not argue in his motion to the Supreme Court, that the trial court committed obvious or probable error by accepting SWMC's counsel's certifications as evidence supporting SWMC's claims to the peer-review and quality improvement privileges, *see App. 105 and Mot. for Discr. Rev. at 7-9*, and by declining, in response to his second motion for reconsideration, to conduct an *in camera* review, *see App. 102-06 and Mot. for Discr. Rev. at 11-15.* No decision requires *in camera* review, much less requires it upon as belated a request as plaintiff made in this case, and ER 104(a) allows a court to rule on the existence of a privilege based on evidence that might not otherwise be admissible, such as hearsay. *See* K. B. Tegland, *Wash. Practice: Evidence Law and Practice*, 5th ed., § 104.5.

Appeals Commissioner copies of declarations of SWMC counsel Forbis, *Moy. 2d Supp. App. 227-29*, and of Cindy Eling, Director of SWMC's Quality Department, *App. II 152-54 and Moy. 2d Supp. App. 233-43*, that SWMC had filed in opposing plaintiff's trial court motion for an evidentiary hearing. Plaintiff did not object to the Commissioner being provided with those declarations, and his counsel submitted a letter, *App. II 163-64*, addressing SWMC's supplemental submissions, as well as SWMC policies that had been produced to him by SWMC during discovery, *App. II 163-216, 228(¶ 5)*. On August 30, 2010, the Commissioner issued a Ruling denying discretionary review. *App. II 120-28*. Plaintiff's motion to modify was denied on November 9, 2010. *Second Supp. App. filed with "Petition" for Review (by Supreme Court), first page.*

IV. ARGUMENT WHY THE SUPREME COURT SHOULD DENY DISCRETIONARY REVIEW.

A. Dr. Moynihan Has An Interest in Preventing the Production to Plaintiff of Privileged SWMC Records that Pertain to Him.

Although the records at issue are SWMC's, some concern Dr. Moynihan. RCW 70.41.200(1) and RCW 4.24.250 do not preclude him from asserting the quality improvement and peer review privileges with respect to records that pertain to him. Plaintiff has not argued otherwise.

B. Review Should Be Denied Because Plaintiff Has Failed to Address the RAP 13.5(b) Criteria.

Because the Court of Appeals' rulings are interlocutory ones rather than decisions terminating review, they are reviewable only under RAP 13.5(b). Plaintiff's "Petition for Review" makes no attempt to show that any of the RAP 13.5(b) criteria are met. Even if the "conflict" arguments in his motion are treated as claims of obvious or probable error under RAP 13.5(b)(1) and (2), plaintiff fails to address the "renders further proceedings useless" and "substantially alters the status quo or [his] freedom to act" prongs of those rules. Review may and should be denied because of that omission.

C. The Nature of the Claim in Aid of Which Plaintiff Made His Request for Production of SWMC Records is Irrelevant.

Plaintiff asserts, *Mot. at 6-7*,[9] that discovery of SWMC's quality improvement program files pertaining to Dr. Moynihan might be relevant as evidence of corporate negligence on the part of SWMC in credentialing Dr. Moynihan, citing *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984), *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991), and *Ripley v. Lanzer*, 152 Wn. App. 296, 324-25, 215 P.3d 1020 (2009). *Mot. at 6-7*. None of those decisions has anything to do with the applicability of privileges, and plaintiff's relevance argument fails on its

[9] Citations hereafter to "*Mot.*" are to the RAP 13.4 "Petition" for Discretionary Review that is being treated as a RAP 13.5 *Motion* for Discretionary Review.

face because trumping relevance is what privileges are for. The Court has recognized that the Legislature may bar discovery of records of a hospital's quality-of-care peer review activities:

> The Legislature recognized [by enacting RCW 4.24.250] that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review. The immunity from discovery of committee review embraces this goal of medical staff candor in apprising their peers to improve the quality of in-hospital medical practice at the costs of impairing malpractice plaintiffs access to evidence revealing the competency of a hospital's staff.

Anderson v. Breda, 103 Wn.2d 901, 905, 700 P.2d 737 (1985). By enacting RCW 70.41.200(3) and RCW 4.24.250, the Legislature shielded hospital quality improvement/peer review files from discovery, regardless of what type of tort claim such records might help a plaintiff prove.

D. Neither the Trial Court's Discovery Rulings Nor the Court of Appeals Rulings Denying Review Conflict with Any of the Four Decisions Plaintiff Contends Conflict, or Constitute Obvious or Probable Error.

1. There is no conflict with *Burnet v. Spokane Ambulance*.

Plaintiff argues, *Mot. at 7-8*, that *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 486-87, 933 P.2d 1036 (1997), holds that hospital credentialing records are discoverable as a matter of law because they are relevant to a negligent credentialing claim. *Burnet* holds no such thing. *Burnet* addressed whether it had been an abuse of discretion for a trial court to limit a plaintiff's discovery and exclude expert testimony on a

negligent credentialing claim as a sanction for discovery violations without having made a record of considering a less severe sanction. The case had nothing to do with the plaintiff's right to obtain discovery of hospital records as to which the hospital claimed privilege under RCW 4.24.250 or RCW 70.41.200(3). No conflict with *Burnet* exists.

2. There is no conflict with *Coburn v. Seda.*

Plaintiff argues that the discovery rulings at issue here conflict with a statement in *Coburn v. Seda*, 101 Wn.2d 270, 276-77, 677 P.2d 173 (1984), that "documents generated outside" hospital peer-review and quality improvement committee meetings are not privileged. *Mot. at 8-9.* Plaintiff then asserts, *Mot. at 9*, that the Court of Appeals erred in denying discovery of SWMC's "administrative records . . . because they do not contain the record of immune proceedings and do not interfere with the statute's [RCW 70.41.200(3)'s] purpose . . .." That argument is difficult to respond to because it cannot be parsed. Rather than try to figure out what plaintiff means, Dr. Moynihan would simply note that rulings based on the privilege conferred by RCW 70.41.200(3) could not possibly conflict with *Coburn* because *Coburn* was decided before that statute was enacted in 1986.

3. There is no conflict with *Anderson v. Breda.*

Citing *Anderson,* 103 Wn.2d at 906, plaintiff argues, *Mot. at 9*, that records of *retrospective* hospital peer-review activity may be privileged but that records of *prospective* peer-review activity are not.[10] Even if the comment in *Anderson* to which plaintiff alludes is treated as a holding, it does not apply to records of quality improvement programs mandated by RCW 70.41.200(1). *Anderson* was concerned only with RCW 4.24.250, because RCW 70.41.200(1) had not yet been enacted.[11] RCW 7.41.200(1) expressly requires every hospital to establish "a quality improvement committee with the responsibility to review the services rendered in the hospital, ***both retrospectively and prospectively***, in order to improve the quality of medical care of patients and to prevent medical malpractice [emphasis supplied]," and RCW 70.41.200(3) confers a privilege against discovery on the records of such committees. Thus, any distinction between "retrospective" and "prospective" hospital peer-review records that existed under RCW 4.24.250 when *Anderson* was decided was eliminated for records of hospital quality improvement programs by the subsequent enactment of RCW 70.41.200(3).

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[10] Plaintiff first made that argument in his motion to modify the Court of Appeals Commissioner's ruling denying review under RAP 2.3(b). *Mot. to Modify at 9-10.*

[11] *Anderson* was decided in May 1985. RCW 70.41.200 was enacted in 1986.

4. There is no conflict with *Putman v. Wenatchee Valley Med. Ctr.*

Citing *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009), plaintiff claims, *Mot. at 12*, that the trial court's privilege rulings deprive him of his constitutional right of access to court, which, according to *Putman*, 166 Wn.2d at 979, "includes the right of discovery authorized by the civil rules." Plaintiff reads too much into that statement in *Putman*. The Supreme Court's point was that the certificate of merit statute, RCW 7.70.150, impermissibly denied medical malpractice plaintiffs the opportunity to get into court and engage in discovery. *Putman* does not hold or say that a plaintiff, once in court, has an absolute right to all relevant evidence, privileged or not. The *Putman* court's use of the phrase "right of discovery authorized by the civil rules" recognizes, as CR 26(b)(1) provides, that a party may discover "any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action [emphasis added] . . . ," subject to a trial court's discretionary authority to further limit discovery under CR 26(c).

Because the SWMC records are privileged from discovery, the civil rules do not authorize plaintiff to discover them. There is no conflict with *Putman* and no deprivation of a right of "access to courts."

E. The "Harm" Prongs of RAP 13.5(b)(1) and (2) Are Not Satisfied.

1. The privilege rulings do not "render further proceedings useless".

Despite the trial court discovery rulings about which plaintiff complains, plaintiff still has the malpractice claims under which he seeks to recover damages to fully compensate Jordan Gallinat for all injuries the defendants allegedly caused. Thus, further proceedings are not "useless" within the meaning of RAP 13.5(b)(1). If this type of ruling could be said to render further proceedings "useless" within the meaning of RAP 13.5(b)(1), the same could be said of any interlocutory discovery ruling, and interlocutory review would be favored and granted frequently, which is not what Washington appellate courts do. *See Right-Price Rec., LLC v. Connells Prairie Cmty Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002) ("discretionary review is not favored because it lends itself to piecemeal, multiple appeals").

2. The rulings also do not substantially alter the *status quo* or limit plaintiff's freedom to act.

Plaintiff has not shown that either the trial court's discovery rulings or the Court of Appeals rulings denying review substantially alter the *status quo* or substantially limit his "freedom to act" within the meaning of RAP 13.5(b)(2). Under the *status quo*, plaintiff does not have SWMC's quality improvement materials; the court's rulings do not alter

that. And, in any event, as noted in Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 *Wash. L. Rev.* 1541, 1545-46 (1986), RAP 13.5(b)(2) "was intended to apply 'primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right,'" and:

> It can be argued... that subsection (b)(2) should be applied only when a trial court's order has immediate effects outside the courtroom. This interpretation of the 'status quo' test and 'freedom of a party to act' test would fit with the notion that subsection (b)(2) was intended to focus on injunctions and the like. A trial court action then arguably would not qualify for review under RAP 2.3(b)(2) if it merely altered the status of the litigation itself or limited the freedom of a party to act in the conduct of the lawsuit.

The discovery rulings at issue here have effects only "inside" the courtroom and in "conduct of the lawsuit."

F. The Supreme Court Should Decline to Consider Such New Arguments as Plaintiff May Make in Reply.

Plaintiff's motion omits arguments he emphasized below, *i.e.*, that the trial court should not have accepted SWMC's counsel's sworn certifications as evidence supporting SWMC's claims to the peer review and quality improvement privileges, *see Mot. for Discr. Rev. (to Court of Appeals) at 7-9*, and should have conducted an *in camera* review before ruling that SWMC's records are privileged, *see Mot. for Discr. Rev. (to Court of Appeals) at 11-15.* If plaintiff renews those arguments in reply,

or makes other arguments in reply that do not appear in his motion, the Supreme Court should not consider them. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is [raised] too late to warrant consideration").

V. CONCLUSION

For the foregoing reasons, plaintiff's motion for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 10th day of January, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorney for Respondent Moynihan

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of Washington that, on the 10th day of January, 2011, I caused a true and correct copy of the foregoing Answer of Respondent Daniel Moynihan, M.D., to Plaintiff's Motion for Discretionary Review to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner:
Lawrence Wobbrock, WSBA #31412
Lawrence Wobbrock Trial Lawyer, P.C.
806 S.W. Broadway Floor 10
Portland, OR 97205-3312
lwobbrock@wobbrock.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

John Budlong, WSBA #12594
Law Offices of John Budlong
100 Second Ave. S., Suite 200
Edmonds, WA 98020-3551
johnbudlong@lojb.net

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondent Southwest Washington Medical Center:
Amy T. Forbis, WSBA #13779
Bennett Bigelow & Leedom, P.S.
1700 7th Ave. Suite 1900
Seattle, WA 98101-1355
aforbis@bbllaw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondent Kathleen Hutchison, M.D.:
John C. Graffe, Jr., WSBA #11835
Johnson, Graffe, Keay, Moniz & Wick, LLP
925 Fourth Ave., Suite 2300
Seattle, WA 98104
johng@jgkmw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondent Dr. Moynihan:
Dana S. Scheele, WSBA #39116
Hoffman, Hart & Wagner, LLP
1000 SW Broadway, Suite 2000
Portland, OR 97205
dss@hhw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

DATED this 10th day of January, 2011, at Seattle, Washington.

Carrie A. Custer

OFFICE RECEPTIONIST, CLERK

To: Custer, Carrie
Cc: Spillane, Mary; Ferm, Dan; lwobbrock@wobbrock.com; John Budlong; Amy T. Forbis; ~Graffe, John; Dana Scheele
Subject: RE: Fellows/Gallinat v. Moynihan, et al., Supreme Ct. No. 85382-7

Rec'd 1/10/2011

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From: Custer, Carrie [mailto:CCuster@williamskastner.com]
Sent: Monday, January 10, 2011 1:16 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Spillane, Mary; Ferm, Dan; lwobbrock@wobbrock.com; John Budlong; Amy T. Forbis; ~Graffe, John; Dana Scheele
Subject: Fellows/Gallinat v. Moynihan, et al., Supreme Ct. No. 85382-7

Attached for filing in .pdf format is the Answer of Respondent Moynihan to Plaintiff's Motion for Discretionary Review in *Fellows/Gallinat v. Moynihan, et al.*, Supreme Court Cause No. 85382-7. The attorneys filing this answer are Mary Spillane, WSBA No. 11981, e-mail address: mspillane@williamskastner.com and Dan Ferm, WSBA No. 11466, e-mail address: dferm@williamskastner.com.

Respectfully submitted,

Carrie A. Custer
Legal Assistant to Mary H. Spillane, Daniel W. Ferm and Arissa M. Peterson
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

WILLIAMS KASTNER™